Supreme Court, U.S.
FILED
APR 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Michael F. Murray,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Our Petition pointed out that the First Circuit's decision in this case with respect to the warehouse searches was in conflict with decisions of the Second, Fourth, Fifth, Sixth, Eighth and Eleventh Circuits; with the decisions of the highest courts of eight states; and with decisions of the intermediate appellate courts of two other states (Pet., at pp. 10-14). The government does not deny this, but claims that there is not really a "true" conflict because some of the cases were decided before *Nix v. Williams*, 467 U.S. 431 (1984), and those courts of appeals might now reach

a different decision in light *Nix's* recognition of the inevitable discovery rule.

There is nothing to the government's position. *Nix* did not change the law in the federal courts. It merely reaffirmed it. Prior to *Nix*, "[e]very Federal Court of Appeals having jurisdiction over criminal matters . . . endorsed the inevitable discovery doctrine." *Nix v. Williams*, 467 U.S. at 440 n.2. The courts of appeals that have decided cases in conflict with the court below thus did so despite their recognition of an inevitable discovery rule. Moreover, the government says nothing about the state court decisions we have cited. The quotations in our Petition show that these courts specifically considered and rejected application of the inevitable discovery rule to cure an illegal search because to do so would be to destroy the warrant requirement. See Pet., at pp. 12-14, notes 12-18.

Still further, to say that the outcome in those conflicting circuits should be different in light of *Nix* is to beg the question presented by this case.[1] As the Petition discusses, the Eleventh Circuit, in a case decided after *Nix*, specifically refused to adopt the position the government expouses here. *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984). The Fifth Circuit has now done the same in *United States v.*

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[1] Our Petition cites the Second Circuit's decision in *United States v. Segura*, 663 F.2d 411 (2d Cir. 1981), to show the conflict between that court of appeals and the decision here. We add the Second Circuit's earlier opinion in *United States v. Alvarez*, 643 F.2d 54, 64 (2d Cir.) ("we will not risk the whittling down of the warrant requirement . . . by justifying the admission of evidence under a broad inevitable-discovery exception"), *cert. denied*, 454 U.S. 839 (1981).

Cherry, 759 F.2d 1196, 1205 (5th Cir. 1985), which relied upon *Satterfield* and the leading case of *United States v. Griffin*, 502 F.2d 959, 961 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974), to hold that a result such as that reached by the court below "would cause the inevitable discovery exception to swallow the [warrant requirement] by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means."

The Tenth Circuit, in a post-*Nix* decision not cited by the government, also has now joined the six other circuits which are in conflict with the court below.[2] In *United States v. Owens*, 782 F.2d 146, 152-53 (10th Cir. 1986), the Tenth Circuit, like the Eleventh Circuit in *Satterfield*, held that when an illegal search occurs, the process of procuring the evidence legally must already be underway or the inevitable discovery rule will not apply. See also *United States v. Romero*, 692 F.2d 699, 704 (10th Cir. 1982).[3]

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[2] It is true, as the government points out, that the Ninth Circuit has now joined the court below in applying *Nix* in the "search-illegally-first-obtain-the-warrant-later" context. See *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985). But as Circuit Judge Reinhardt recently stated, this precedent now requires the Ninth Circuit to reach a result that "will serve only to encourage illegal and unconstitutional searches." *United States v. Andrade*, No. 85-3122, decided March 19, 1986 (9th Cir.) (Reinhardt, J., "specially concurring").

[3] The government asserts that the "warrantless entry here was simply an early stage of a procedure designed to culminate in a warrant search" (Brief in Opp., at p. 16 [typescript]). This is indeed a remarkable assertion. The idea that one may violate the Fourth Amendment in order to comply with it is not now and never will be part of this country's jurisprudence.

The government can take no comfort from *Segura v. United States*, 104 S.Ct. 3380 (1984), which even the First Circuit acknowledged was "arguably" against its decision in this case. *Nix* was decided before *Segura*. Yet if the government were correct that *Nix* applies in the Fourth Amendment context, *Segura* would easily have been decided on inevitable discovery grounds. It was not. Indeed, the Chief Justice in his majority opinion in *Segura* neither discussed nor cited his opinion for the Court in *Nix*. Instead, his *Segura* opinion reaffirmed that the direct products of illegal entries will continue to be suppressed and added, in a statement joined by Justice O'Connor, that "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case." 104 S.Ct. at 3390.

With respect to the Eleventh Circuit's post-*Nix* decision in *Satterfield*, the government seeks to distinguish the case on the basis that the agents there illegally seized the evidence they discovered upon their warrantless entry, whereas here the agents only illegally discovered the evidence. *Nix*, of course, recognizes no such distinction. It has not been adopted by any other appellate court. It ignores that the Fourth Amendment's warrant requirement applies to both searches and seizures. And it leads to the untenable proposition that officers may first search without a warrant and then seek one only if they have illegally found something worth carrying away.

Moreover, not even the First Circuit subscribes to the government's theory. In a recent opinion adhering to its decision in this case, the First Circuit held that

when as here the agents conduct an illegal search, observe evidence, secure the premises, then obtain a warrant and seize what they had already illegally discovered, they in effect have seized the evidence from the moment of its unlawful discovery. *United States v. Silvestri*, No. 85-1534, decided April 1, 1986 (1st Cir.), slip op. at pp. 8-9. While nevertheless following its decision in this case, the First Circuit recognized that it had placed itself in conflict with other courts of appeals. The *Silvestri* court thus specifically discussed at length and rejected not only the Second Circuit's decision in *Segura*, but also the Eleventh Circuit's holding in *Satterfield*, the Fifth Circuit's ruling in *Cherry* and the Tenth Circuit's decision in *Owens*, all of which were decided after *Nix*. *United States v. Silvestri*, *supra*, slip op. at pp. 14-24.

The conflict between the federal courts of appeals (and between the First Circuit and the state courts) on this recurring and important issue cannot be denied. The case thus clearly warrants review by this Court.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a typescript copy (to be replaced with printed copies) of Petitioner Murray's Reply Brief has been mailed, first-class, postage prepaid to the following on Monday, April 14, 1986:

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